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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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PATRICK CONWAY, ROBERT CASTRO AND ROY CASTRO,  
PETITIONERS

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioners challenge (Pet. 17-20) the district court's denial of a motion to stay their trial in order to entertain a claim raised under the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*

1. Following a bench trial in the United States District Court for the Eastern District of Michigan, petitioners and three other defendants were convicted of conspiracy to distribute marijuana and to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner Robert Castro was sentenced to four years' imprisonment and a \$15,000 fine. Petitioner Roy Castro was sentenced to one and a half years' imprisonment and a \$3,000 fine. Petitioner Patrick Conway was sentenced to three years' imprisonment. The court of appeals affirmed by an unpublished judgment order.

The district court found (C.A. App. 8-17) that the government's evidence showed that, between January 1977 and August 1981, petitioners, their co-defendants, and other unindicted co-conspirators participated in a scheme to distribute large quantities of marijuana in Eastern Michigan. During this period deliveries of marijuana were made by various participants in the conspiracy to several distribution points in the vicinity of Howell, Michigan. On various occasions Conway, Robert Castro, and others picked up the marijuana for redistribution. Conway and Robert Castro also delivered large sums of money involved in these transactions. Roy Castro used his home as a drop-off point and hosted meetings there during which the conspirators discussed their marijuana distribution business.

2. Petitioners were indicted on August 28, 1981. Thereafter, the district court (Newblatt, J.) set a cut-off date of November 30, 1981, for filing motions. During a December 4 pretrial hearing, Robert Castro, who had retained counsel on September 9, requested a court order directing disclosure of the convening and termination dates of the grand jury that returned the indictment. On December 7, in response to a subsequent motion, Judge Newblatt directed that Robert Castro's counsel be furnished copies of all records relating to the grand jury selection process. On December 11, Robert Castro, joined by his co-defendants, filed a motion for a stay of proceedings and sought dismissal of the indictment, alleging that the grand jury had been improperly selected and that the district court clerk's office had failed to comply with the court's disclosure order (C.A. App. 32-36). During a December 23 hearing on the motion before Chief Judge Feikins, who supervised the jury selection process, the court directed the clerk to furnish to counsel jury selection records for both the grand and petit juries, directed that any further motion based upon such records be filed by December 29, and stated that it would assist the

defendants in the event that there was any difficulty in procuring the material from the clerk's office (Dec. 23 H. Tr. 38-40, 67-68). On December 29, counsel made an inquiry whether their earlier motion challenging the jury selection process was timely under 28 U.S.C. 1867(a). On January 5, 1982, Judge Feikins dismissed the motion as untimely on the ground that the challenge to the grand jury selection scheme had not been presented with due diligence as required by 28 U.S.C. 1867(a) (C.A. App. 44).

3. A petit jury was empanelled on December 23. On December 29, 1981 — while the motion to stay the proceedings because of alleged irregularities in the selection of the grand jury was pending — Robert Castro filed a motion to stay the trial and for an evidentiary hearing, this time because of alleged improprieties in the selection of the petit jury (C.A. App. 45-50).<sup>1</sup> The motion alleged, *inter alia*, that, contrary to 28 U.S.C. 1863(b)(4) and the court's local jury selection plan, the master wheel for selecting jurors had not been emptied and refilled within the preceding four years — despite a May 4, 1981 order from the district court directing the clerk of court to do so. As a result, petitioner Robert Castro claimed, the petit jury impanelled, created from a list of persons registered to vote in the 1976 general election, was not selected from a fair cross section of the community. Relying upon census reports and statistical data concerning the ethnic identities of persons whose names had been placed in the selection wheel, he averred that, although 14.7% of the 1980 population of the subdivision of the district in question were Hispanics or other minorities, only 6.4% of the petit jury pool were members of

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<sup>1</sup>Although the other petitioners joined in filing the motion to dismiss on the ground of irregularities in selecting the grand jury, only Robert Castro sought a stay because of alleged improprieties in selecting the petit jury.

such minority groups. Robert Castro claimed that the procedures used violated the Jury Selection and Service Act and denied him his Sixth Amendment right to trial by jury. Finally, he suggested that he was unable adequately to establish a pattern of minority underrepresentation because the clerk of the district court had refused to permit counsel to inspect jury selection records.

On January 5, 1982, the district court heard argument on the pending motion. The court rejected the claim made under the Jury Selection Act on the grounds that the motion was untimely and that, in any event, no substantial violation of the Act had been demonstrated. A hearing on the constitutional claim was scheduled for the following day. However, petitioners and their co-defendants pre-empted further proceedings by waiving a jury trial and the constitutional claim raised in the December 29 motion. Jan. 5 H. Tr. 59-62, 63-84.

The court of appeals affirmed, holding that the district court did not abuse its discretion in dismissing the motion for failing to comply with the timeliness requirement of the Act (Pet. App. 2a).

4. No further review is warranted of petitioners' claim that the district court improperly denied the motion to stay proceedings based upon alleged defects in the list from which the petit jury was drawn. Petitioners' submission (Pet. 18-19) is directed entirely to their claim that the petit jury panel drawn for their trial was improperly constituted, and the related argument that the district court clerk improperly denied them access to jury records necessary to prove their claim. But the court of appeals upheld the district court's order denying Robert Castro's motion to stay his trial on the ground that the motion had not been timely filed (Pet. App. 2a). Petitioners ignore this ground for the decision, presenting no explicit argument that it was erroneous.

To the extent that petitioners may be understood to deny that untimeliness was an adequate ground for denial of their motion, they disregard the plain language of the Jury Service and Selection Act. The Act provides that "the exclusive means by which a person accused of a Federal crime \* \* \* may challenge any jury on the ground that it was not selected in conformity with [the Act]" (28 U.S.C. 1867(e)) is filing of an appropriate motion "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier" (28 U.S.C. 1867(a)).

Nor does the alleged failure of the clerk of the district court to provide petitioner Robert Castro's counsel access to jury records undercut the basis for the determination that his motion was untimely. The district court plainly stood ready to ensure that defense counsel was provided the access to pertinent records required by the statute, and it entered an order to that effect when one was sought. See pages 2-3, *supra*. But although counsel was appointed on September 9, 1981, he did not seek the court's assistance in securing jury records until December 4, 1981, and then sought only grand jury records. Any obstacles Robert Castro's counsel may have encountered with the district court clerk cannot explain Castro's failure either to file a motion challenging the petit jury, or at least to seek any necessary judicial assistance in enforcing the right of access to jury records, prior to December 29, 1981. Petitioner has given no explanation why the motion filed on December 29 — which alleged both that access to records had been denied and that the petit jury list had been improperly constituted — could not have been filed earlier. Accordingly, there was no abuse of discretion in the district court's determination, affirmed by the court of appeals, that the

motion directed at the petit jury was not filed with due diligence. In any event, this fact-bound determination encompasses no issue of general importance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
*Solicitor General*

NOVEMBER 1983